JUDGE RICHARD POSNER ON THE SCOPE OF THE FREE SPEECH CLAUSE

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INTRODUCTION

It is worthy of note when someone of the jurisprudential stature of Richard Posner elaborately articulates from the bench a distinctive approach to a fundamental question in an area as crucial as freedom of speech. It is therefore not without some justification that this Essay focuses on the concurring opinion of Judge Posner in the recent case of *Miller v. Civil City of South Bend*,[1] a case that Judge Posner himself refers to as "fascinating."[2]

In *Miller* the en banc Seventh Circuit divided seven to four on the constitutional issues presented. The various opinions spanned approximately fifty-three pages of the Federal Reporter. The occasion for these extended constitutional disquisitions was the not obviously monumental jurisprudential question of whether a particular Indiana public indecency statute[3] could be constitutionally applied to prohibit nonobscene barroom commercial nude dancing. The court majority, with which Judge Posner concurred, held that the statute as applied was unconstitutional[4] on the grounds that such an application amounted to an unjustified[5] interference with the plaintiffs'[6] exercise of their free speech rights.[7]

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1 904 F.2d 1081 (7th Cir.) (en banc), *cert. granted sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 38 (1990). For an expression of generalized lack of intellectual sympathy for the majority opinion and the concurring opinion of Judge Posner in *Miller*, see Walker v. City of Kansas City, Missouri, 911 F.2d 80, 85-90 (8th Cir. 1990) (per Bowman, J., with Dunbauld, J., concurring on other grounds) (dicta). *But cf. id.* at 98, 99 n.6 (Lay, J., dissenting) (dicta) (expressing greater sympathy with the majority in *Miller* and with the relativist and subjectivist elements of Judge Posner's concurring opinion in *Miller*).

2 *Miller*, 904 F.2d at 1090 (Posner, J., concurring).

3 IND. CODE ANN. § 35-45-4-1 (Burns 1985).

4 *Miller*, 904 F.2d at 1089.

5 *See id.* at 1088.

6 The plaintiffs included three women who were professionally engaged as barroom nude dancers, as well as two nude dancing establishments, only one of which was regulable as serving alcoholic beverages. *See id.* at 1082. For discussion of the constitutional relevance in this general context of the twenty-first amendment, see New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981)(per curiam).

7 *See Miller*, 904 F.2d at 1085.

Judge Posner's concurring opinion, which is remarkable for its breadth and depth of learning, focuses not so much on the logically secondary issue of whether the state's burdening of the plaintiffs' speech could be constitutionally justified, but on the logically prior issue of whether the plaintiffs' activities could be classified as involving "speech" within the meaning of the first amendment.[8] Judge Posner concluded that the plaintiffs' activities did in fact fall within the scope or ambit of coverage of the free speech clause,[9] based on a broadranging argument, which is considered below. For the sake of background and perspective, though, it may be useful to first consider more generally how questions involving the scope of the free speech clause may best be approached.

I. A Values-Based Approach to the Speech/Non-Speech Distinction

The question of whether commercial barroom nude dancing, or anything else, counts as "speech" in the constitutional sense could be approached in various ways. It is conceivable, for example, that one might wish to ask whether most of the drafters and ratifiers of the first amendment entertained some reasonably reconstructible general intent in the matter, especially where the literal text of the first amendment would not seem to suggest the inclusion of most commercial nude dancing. Such an approach is, however, something of a nonstarter, at least in mainstream contemporary jurisprudential thinking.

This is not because the relevant original intent is nonexistent, equivocal, or unascertainable, but because for one reason or another we simply do not collectively care sufficiently about original intent to grant it decisive weight in determining contemporary jurisprudential issues.[10] Judge Posner is hardly alone in assuming that a concern for original intent in this context implies a preference for a "petrified" over a "living" Constitution.[11] This position is to some extent something of a red herring, in that no serious originalist approach is inclined to ignore new and unanticipated sorts of

[8] *See id.* at 1089-1104 (Posner, J., concurring).
[9] *See id.* at 1092 (Posner, J., concurring).
[10] *See id.* at 1095-96 (Posner, J., concurring).
[11] *See id.* (Posner, J., concurring).

threats to at least the established values underlying the constitutional provision in question.[12] Regardless, originalism currently lacks sufficiently broad-based credibility to merit a full exposition here.

On the other hand, a values-based approach to the free speech clause, under which no controlling weight is necessarily assigned to the values of the constitutional framers or ratifiers, seems more attuned to the main currents of contemporary jurisprudence. We shall also assume that there is little point at this historical juncture in arguing that the values underlying the free speech clause should be confined to a distinctively political sort.[13]

Among the most obvious candidates for the broad range of values, purposes, or aims that might distinctively underlie and inform free speech jurisprudence and delimit its scope are the promotion of the societal search for truth, meaningful participation in the democratic process of self-government, and individual self-fulfillment or self-realization.[14] It would be foolish for judges to decide issues involving the scope of the free speech clause simply by direct recourse to this or any other list of values without regard for established case law. Ultimately, though, the purposes or values

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[12] *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984)(en banc)(Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). In *Ollman* Judge Bork argued that originalism counsels that "it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application." *Id.* at 995 (Bork, J., concurring). More specifically, Judge Bork concluded that "[t]he first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting." *Id.* at 996 (Bork, J., concurring). Judge Bork's approach to *Miller* would thus initially involve consideration of whether the protection or legitimate furtherance of the values underlying the free speech clause, actually held by the framers themselves, require recognizing ordinary commercial barroom nude dancing as speech in the constitutional sense. Perhaps the real difference between Judges Bork and Posner in this regard focuses on the extent, if any, to which it is legitimate for a judge to depart from the values, at some particular level of generality, of the framers, to the extent those values are reasonably unequivocal and ascertainable. For an assessment by Judge Posner of Robert Bork's approach to judicial interpretation, see Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

[13] For a cogent and salutary extended exposition of the importance of the distinctively political in the context of the free speech clause, see Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493 (1990).

[14] *See, e.g.*, Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983). *See generally* R.G. WRIGHT, THE FUTURE OF FREE SPEECH LAW 1-31 (1990).

thought to distinctively underlie the free speech clause serve as a touchstone. If those values, properly understood, are not significantly implicated in a particular case or kind of case, then the reasons for distinctively constitutionally protecting speech are not present. It would seem most sensible in such cases to decline to find the activity at issue to constitute speech in the constitutional sense.

Of course, even if all this is granted, controversy remains. To illustrate both the general application of a values-based approach to the scope of speech in the constitutional sense and its ineliminable potential for controversy, we might consider the recent Ninth Circuit case of *Duran v. City of Douglas, Arizona*.[15] *Duran* involved a civil rights suit brought to recover for police activity culminating in the plaintiff's arrest and physical injury.[16] The primary interest in our context, though, is the free speech issue involved.

In *Duran*, the police were sent to a hotel based on a bartender's complaints about an "unruly" patron.[17] Upon their arrival, the police found the plaintiff "intoxicated and threatening the bartender."[18] After "a few heated words"[19] between the plaintiff and one of the officers, the plaintiff was escorted out of the bar and left the scene as a passenger in an automobile driven by his wife.[20] Soon afterward, the plaintiff passenger directed a number of obscene gestures and oral profanities at one of the officers who had been dispatched to the bar.[21] The arrest and injuries complained of by plaintiff occurred shortly thereafter.[22]

Writing for the court, Judge Alex Kozinski was critical of the plaintiff's conduct.[23] Recognizing, though, the impermissibility of basing an arrest at least in part on the arrestee's legitimate exercise of free speech rights, Judge Kozinski considered whether the plaintiff's actions involved speech in the constitutional sense.[24] Judge Kozinski declared that "[t]he freedom of individuals to oppose or chal-

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15 904 F.2d 1372 (9th Cir. 1990).
16 *See Duran*, 904 F.2d at 1374-75.
17 *Id.* at 1374.
18 *Id.*
19 *Id.*
20 *Id.*
21 *See id.* at 1374-75.
22 *See id.* at 1375.
23 *See id.* at 1377.
24 *See id.* at 1377-78.

lenge police action verbally without thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state."[25] With regard to the particular instance before the court, Judge Kozinski concluded that "[i]narticulate and crude as [the plaintiff's] conduct may have been, it represented an expression of disapproval toward a police officer with whom he had just had a run-in. As such, it fell squarely within the protective umbrella of the First Amendment."[26]

Few courts would disagree with Judge Kozinski's conclusion in this regard. Yet if one actually applies the logic of the broad range of values that might be thought to underlie the free speech clause, the conclusion reached seems much more problematic. Under such an approach, to amount to speech in the constitutional sense, the plaintiff's language and gestures must, at a minimum, meet one element of the following disjunction: either the plaintiff's activity must be countable as a contribution to our society's search for truth in some relevant, sufficient sense, or as an act of participation in the process of democratic self-government, or as an act of self-realization or self-development in a sense in which such an aim would be suitably furthered by a distinctive free speech clause.[27]

Now, it is undeniable that the plaintiff's language and gestures in *Duran* could fit any of these elements, if the element or the distinctive free speech value chosen were stretched with sufficient violence. Doubtless the plaintiff was expressing some perhaps rather vague proposition he took to be true, such as that the police officer's actions were worthy of condemnation. In light of the "inarticulate"[28] character of the plaintiff's expression, it is difficult to say more.

There does not seem, for example, to be any broader or public policy-implicative point or message to the plaintiff's expression in *Duran*, of itself or in light of its context. This is not to require that speech in the constitutional sense be popular, plausible, or well-intended. Nor should we discriminate against those of us who, for whatever reason, simply tend not to be terribly articulate.[29] But there is a

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[25] *Id.* at 1378.

[26] *Id.*

[27] *See supra* note 14 and accompanying text.

[28] *Duran*, 904 F.2d at 1378.

[29] *See* R.G. WRIGHT, *supra* note 14, at 18-19.

generally detectable difference between the emotive adverse reaction by an apparently intoxicated[30] person to police intervention on the one hand, and an angry, not terribly articulate protest of one's treatment by the police where one's protest involves reference to some recognizable point or idea with broader social content or implication. There is a recognizable and constitutionally relevant difference between emotively objecting to being escorted out of a bar and, say, objecting to being escorted away from a racially segregated lunch counter.

The case for finding Duran's activities to involve speech in the constitutional sense would therefore be strengthened[31] if, for example, Duran's threats[32] or other discourse with the hotel bartender had involved some identifiable social purport or content in a broad sense. The same could be said if Duran's objections to his treatment by the police had involved a sense of ethnic-based unfairness, or at least implicit reference to an alleged pattern of official, or even societal, discrimination. The appellate report of *Duran* provides no clear indication that either of these possibilities obtained.

The absence of any such social content, or of the intent to purvey or imply such social content, is important to the free speech analysis in that it suggests that the free speech values or purposes identified above[33] will not be distinctively promoted by recognizing the activity in question as speech in the constitutional sense. It is certainly conceivable that, on the above factual assumptions, someone may still maintain that Duran's activities significantly involved the ongoing societal quest for relevant truths, or amounted to democratic participation in government, or distinctively implicated the value of self-actualization or self-development in a relevant sense. But in such a case, the fear naturally arises that speech in the constitutional sense is thereby being expanded to include general kinds of activities that are so removed from the paradigmatic or plainly central kinds of speech as to raise the question of why a society would want to accord such kinds of activities the powerful constitutional

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30 *Duran*, 904 F.2d at 1374.

31 For a discussion of how to resolve close cases of whether speech should, in other free speech contexts, be considered as speech on a matter of public interest or concern, see R.G. WRIGHT, *supra* note 14, at 185-217.

32 *Duran*, 904 F.2d at 1374.

33 *See supra* note 14 and accompanying text.

immunity from sacrifice for the general social good embodied in the first amendment.[34] If "few of us would march our sons and daughters off to war"[35] to protect a general kind of putative speech, that may be not because most of us disagree with the content of some particular message commonly associated with that kind of speech, but because we realize that the putative kind of speech's general failure to significantly implicate the free speech values in an appropriately robust sense means that the activity in question does not qualify as speech in the constitutional sense.

This is not to suggest, of course, that whether a particular activity counts as speech in the constitutional sense can invariably be determined by considering only the general kind or category of activity into which it falls. It may sometimes be important to consider the particular context, circumstances, and intent. Confiscation of even a political treatise arguably does not raise a free speech issue if the book has no potential significance to any relevant person other than as a paperweight or as a hiding place for paper money. On the other hand, it is conceivable that even plate-balancing on the end of a pole could, under some circumstances, convey in a uniquely effective way some unmistakable political message, such that prohibiting the act of plate-balancing becomes censorship and raises free speech issues. Against the background of these general considerations, then, we may turn to Judge Posner's analysis of the crucial free speech issue in *Miller*.

II. Judge Posner on the Classification of Nude Dancing

As of the time of the en banc Seventh Circuit decision in *Miller*, Judge Posner had established that "erotic discourse" was at least in some instances susceptible of conveying a message sufficient to implicate the free speech clause.[36] More broadly, Judge Posner had observed from the bench[37]

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[34] For a discussion of the nature and strength of constitutional protection of speech, see Wright, *Does Free Speech Jurisprudence Rest on a Mistake?: Implications of the Commensurability Debate*, 23 Loy. L.A.L. Rev. 763 (1990).

[35] Krueger v. City of Pensacola, 759 F.2d 851, 854 (11th Cir. 1985)(quoting Young v. American Mini Theaters, 427 U.S. 50, 70 (1976)).

[36] *See, e.g.*, Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990).

[37] It is certainly conceivable that Judge Posner's academic or scholarly discussions of free speech might represent his true or unconstrained views, while his opinions

that "[t]he purpose of the free-speech clause . . . is to protect the market in ideas, . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain."[38]

Judge Posner's concurring opinion in *Miller*, however, extends the scope of what is to count as speech, for free speech purposes, beyond this point. Focusing not so much on the plaintiff's activity itself as on the general category of dance, clad or unclad, Judge Posner observes that "[d]ance . . . is a medium of expression, of communication."[39] What the dance is thought to express or communicate, however, is not ideas[40] but "emotion, or more precisely, an ordering of sights and sounds that arouses emotion."[41]

This naturally prompts the question whether every human activity amounting to an ordering of sights and sounds calculated to stimulate an emotional or, as in *Miller*, any kind of glandular response counts as speech in the constitutional sense. Judge Posner's analysis begins promisingly by distinguishing between two kinds of expression or expressiveness.[42] In a broad sense, angrily kicking one's wastebasket in the absence of an audience expresses, discharges, or manifests, one's anger.[43] Expression in the narrower sense, however, involves an interpersonal dimension. Posner distinguishes these two senses of expression on the basis that "the expression that is relevant to freedom of speech . . . is the expression of a thought, sensation, or emotion *to another person*."[44]

Crucially, though, this latter, narrower category of expression involving an audience is most definitely not, on Pos-

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from the bench might represent what Judge Posner considered himself bound to hold by virtue of, say, authoritative Supreme Court precedent. However, no role-based conflict between the strictures of Posner as scholar and Posner as judge plays any significant role in the discussion below.

38 Swank v. Smart, 898 F.2d 1247, 1250-51 (7th Cir. 1990).

39 *Miller*, 904 F.2d at 1091 (Posner, J., concurring).

40 *See id.* at 1093 (Posner, J., concurring).

41 *See id.* at 1091 (Posner, J., concurring). Query whether one can meaningfully appreciate a ballet without having an "emotional" reaction thereto. Query also whether an ordering of sights and sounds is not at least equally well describable as the *means* by which something is communicated, rather than that which is itself communicated. *See infra* note 61.

42 *See Miller*, 904 F.2d at 1092 (Posner, J., concurring).

43 *See id.* (Posner, J., concurring).

44 *Id.* (Posner, J., concurring)(emphasis in the original).

ner's analysis, coextensive with speech in the constitutional sense. As Judge Posner explicitly recognizes, there is much expression in the narrower sense that is neither judicially nor widely academically classified as speech for free speech purposes. Posner's own example is "putting geraniums in a window box."[45] And in his own recent case law, Judge Posner employs the interesting and controversial example of "casual chit-chat" between a citizen and a police officer.[46] At least some nude sunbathing,[47] and perhaps a "fashion statement" made by some wearers of earrings[48] might also fall into this category of expression not amounting to speech in the constitutional sense. Additionally, the Supreme Court recently has declined authoritatively to recognize ordinary social or recreational dancing as speech in the constitutional sense.[49]

What Judge Posner's analysis does not offer is a way of distinguishing instances of expression in his narrow sense that do not count as speech from those that do. The

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[45] *Id.* (Posner, J., concurring). Again, if this activity is not inherently and invariably expressive in the narrow sense, it at least has that potential in particular cases. And planting the geraniums in a V-shape in 1942 counts as speech in the first amendment sense on anyone's analysis.

[46] *See Swank*, 898 F.2d at 1250-51.

[47] *See* South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984)(public nudity for the sake of making a nudity-related statement not speech in the constitutional sense unless combined with a constitutionally protected mode of expression). Judge Posner refers to nude sunbathing generally as "nonexpressive," for unspecified reasons. *See Miller*, 904 F.2d at 1092 (Posner, J., concurring).

[48] *See* Rathert v. Village of Peotone, 903 F.2d 510, 517 (7th Cir. 1990)("[N]or could the district court find any suggestion by plaintiffs that they wear ear studs to express political, social, economic, educational, religious or cultural viewpoint, *or any other expressive activity*. Plaintiffs' justification for wearing the ear studs is merely that they 'want to' and 'for fashion'." (emphasis added). The Seventh Circuit's language in *Rathert* seems to suggest either that a public activity could be expressive in Posner's narrower sense without being expressive in a third, even narrower sense requiring the expression of something like an idea or point of view; or else that wearing the ear studs on this occasion failed to rise to the level of expression in either of Posner's senses, if no thought, sensation, or emotion was sought to be conveyed, or if the wearing of the ear studs did not express any inner mental state on the part of the wearers.

[49] City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). The Court in *Stanglin* observed:

> It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons — coming together to engage in recreational dancing — is not protected by the First Amendment.

Id. at 1595.

Supreme Court presumably understands the capacity for social dance to publicly express to an appreciative audience the thought, sensation, or emotion of a Whitmanesque delight in the corporeal. Nude sunbathing engaged in for the purpose of publicly expressing the same message, or to graphically protest the constraints of bourgeoise convention, poses a similar problem of classification that Judge Posner only obscures by classifying nude sunbathing as "nonexpressive."[50]

Of course, it is the task of a judge on any given occasion to resolve a particular case, not to write a treatise or even to resolve a general jurisprudential problem. But our confidence in the correctness of Judge Posner's approach in *Miller* would be substantially enhanced if Posner could offer an account of what is generally missing in social dancing, or even in at least some instances of public nude sunbathing, that is present in the commercial nude dancing in *Miller* that makes only the latter activity speech in the constitutional sense. If there is a responsive, appreciative audience for all these activities, and relevantly similar states of mind or intention on the part of the putative "speakers," it is not easy to see, for example, what difference the exchange of money could possibly make.

Judge Posner at this point refers to the well-known Indianapolis pornography ordinance case of *American Booksellers' Association v. Hudnut*[51] on the theory that the logic of *Hudnut* requires his analysis in *Miller*.[52] It is difficult to see, however, how *Hudnut* disposes of the problem in *Miller*. The assumption made by the City of Indianapolis in *Hudnut* seems to have been that at least some pornography, written or pictorial, seeks to and does convey something like the broadly social idea that women ought to be hierarchically subordinated to men in the sexual realm, if not elsewhere. While the relationship between pornography and the free speech clause is doubtless controversial,[53] it is perfectly possible to grant that some instances of pornography seek to

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[50] *See Miller*, 904 F.2d at 1092.

[51] 771 F.2d 323 (7th Cir. 1985), *aff'd per curiam*, 475 U.S. 1001 (1986).

[52] *See Miller*, 904 F.2d at 1092.

[53] *See, e.g.*, MacKinnon, *Pornography as Sex Discrimination*, 4 L. & INEQUALITY 38 (1986); Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

and do convey a damaging and deeply offensive, but clear social idea, whether they should nevertheless be suppressed or not, while still maintaining that ordinary commercial nude dancing does not seek to or in fact convey any such broadly social idea.[54] If this distinction between certain kinds of pornography and most nude dancing is tenable—and it hardly seems intuitively absurd—then the *Hudnut* case dictates neither Posner's analysis nor his result in *Miller*.

The conclusion seems inescapable that Judge Posner has not provided a usable account of why certain sorts of activities should count as speech and others should not. Judge Posner does articulate his misgivings, however, with respect to certain accounts he finds unacceptable. Among the alternative accounts rejected by Posner would be the suggestion that commercial barroom nude dancing typically does not seek[55] to convey an idea or opinion of the sort requisite to invoking the free speech clause.[56]

On this score, Judge Posner concedes that at least the nude dancing at issue in *Miller* cannot be said to involve the expression of ideas or opinions in any constitutionally relevant sense.[57] But Posner believes that imposing a requirement that an activity convey, or seek to convey, an idea in order to qualify as speech in the constitutional sense is counterintuitive, or leads to unacceptable consequences. Perhaps the essence of Posner's argument in this regard is that making idea-conveyance a necessary and perhaps sufficient condition for speech "would thrust outside the [first] amendment's boundaries virtually all nonverbal art—except the relatively small fraction that is didactic—and much literature as well."[58]

If we set aside Posner's dubious affirmative claim that

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[54] *See Miller*, 904 F.2d at 1091, 1093-96 (Posner, J., concurring).

[55] Courts have recognized that speech in the constitutional sense must involve some minimally sufficient intent or state of mind on the part of the speaker, whatever state of mind or degree of creativity may exist on the part of some actual or potential audience. The First Circuit has observed that "[a]n act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it." Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 895 (1st Cir. 1988)(en banc), *cert. denied*, 488 U.S. 1043 (1989).

[56] For an extended general presentation of the kind of account rejected by Judge Posner at this point, see R.G. WRIGHT, *supra* note 14, at 1-31.

[57] *See Miller*, 904 F.2d at 1093 (Posner, J., concurring).

[58] *Id.* (Posner, J., concurring).

nonverbal art essentially communicates emotions, or provokes an emotional response, this becomes an interesting and powerful argument, to which no single response seems adequate. Fortunately, the jurisprudential tradition of pleading in the alternative is well-established. For the precise form of a dualistic response to Judge Posner's argument, we may turn to a lesser known tradition from moral philosophy under which, it is said, every argument is, to put the matter rather coarsely, ultimately of the form "Oh yeah?" or else of the form "So what?"[59] We shall recur in turn to both of these forms of argument.

The "Oh yeah?" response to Judge Posner's argument cannot, admittedly, be fully decisive, if for no other reason than that aesthetic theory is not so rigorous a discipline as to preclude all but one approach.[60] It does seem clear that most art, and certainly most good art, does not convey or seek to convey ideas in the same sense as does a political tract or a mathematical or scientific treatise. Good art, certainly, is not an elaborately coded message. But it does not seem unreasonable to say that nondidactic, nonverbal art typically conveys ideas and even appeals to the intellect in some sense, whether the audience experiences some emotional reaction or not.[61]

It does not seem, for example, to be merely a pun or a crude equivocation to talk of musical ideas, perhaps revolutionary or cliched. A composer might conclude that at a particular point, C rather than the more obvious C sharp is called for by a partially cognitive aesthetic sense of right-

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[59] For a brief exposition, see Sturgeon, *What Difference Does It Make Whether Moral Realism Is True?*, 24 S.J. PHILOSOPHY 115, 115 & 136 n.1 (Supp. 1986).

[60] For one widely-recognized approach to the problem of "expression" in the aesthetic context, see R. WOLLHEIM, ON ART AND THE MIND 84-100 (1974). For other compulsory cites of inconclusive import, see A. DANTO, THE PHILOSOPHICAL DISENFRANCHISEMENT OF ART (1986); J. DERRIDA, THE TRUTH IN PAINTING (G. Bennington & I. McLeod trans. 1987).

[61] *See, e.g.*, Finnis, *"Reason and Passion:" The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 232-33 (1967). Finnis quotes the Bloomsbury art critic Clive Bell as arguing that "[b]efore we feel an aesthetic emotion for a combination of forms, do we not perceive intellectually the rightness and necessity of the combination? If we do, it would explain the fact that passing rapidly through a room we recognize a picture to be good, although we cannot say that it has provoked much emotion." *Id.* at 237 n.98 (quoting C. BELL, ART 26 (1914)). For examples of judicial recognition, explicitly or implicitly, of the concept of "artistic ideas," see Miller v. California, 413 U.S. 15, 35 (1973); State v. Valdes, 552 So. 2d 1372, 1377 (La. Ct. App. 1989); Piscopo v. Piscopo, 231 N.J. Super. 576, 555 A.2d 1190, 1191 (Ch. Div. 1988), *aff'd*, 232 N.J. Super. 559, 557 A.2d 1040 (App. Div. 1989).

ness. Now, this is not to suggest that art is good insofar as it exhibits this kind of cognitive quality, or that art should be evaluated on this basis. But it does suggest that there is an ideational component to much, if not all art that is entirely separate from the programmatic or thematic ideas in a narrower, more familiar sense that are embodied in some art. If it can be said, for example, that the Beethoven Seventh Symphony is an apotheosis of the dance,[62] or in some thematic sense "about" the dance in the latter, narrower sense of ideas, this does not exhaust the levels in which the composition may be said to intentionally embody and express musical ideas.

There are two obvious responses at this point. First, it might be said that the sense in which, say, a Bach partita expresses nonprogrammatic or nonthematic musical ideas in the broader sense is irrelevant to what we are concerned about in the realm of freedom of speech. Second, it might be said that if the nonthematic Bach partita expresses ideas in a constitutionally relevant sense, then so, inescapably, does ordinary commercial nude dancing. Neither of these responses seems unassailable, however, even if we eschew any qualitative comparison of the work of Bach and of the plaintiffs in *Miller*, and waive any claim that the former is artistically higher or better than the latter.

The point of requiring the presence of broadly social ideas, for free speech classification purposes, is or should be to rule out as "speech" that which is merely and exhaustively self-referential or which involves no pretense of cognitive engagement or application. The musical ideas of Bach, or of a lesser composer, are not ideas in the same sense as, for example, the ideas of chemical or economic equilibrium, but they have significant intention-expressing cognitive content and can be uncontroversially linked to the recognized free speech value of promoting the development and fulfillment of the speaker's own capacities in a narrow, rigorous sense.[63] In a word, Bach's thoughtful construction of a partita tends to implicate the free speech value of Bach's self-realization in a way to which the typical exercise of commercial nude dancing does not even pretend.

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[62] *See* Kerman & Tyson, *Beethoven, Ludwig van*, in 2 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS § 14, at 382 (S. Sadie ed. 1980).

[63] *See supra* note 14 and accompanying text.

It is possible to argue that distinguishing between Bach and the plaintiffs in *Miller* in this regard reduces to snobbery, social class bias, or arbitrary valuation. As Judge Posner has noted elsewhere, we live in a relativistic age[64] that increasingly resists ascribing objectivity to anything resembling an apparently invidious distinction. Beyond some point, establishing the relevant differences between art of a familiar sort and most commercial nude dancing becomes inseparable from the broader problem of relativism and subjectivism in adjudication, a problem unavoidably beyond the scope of our present inquiry.[65]

To the extent it is ultimately insisted that the self-realization achievable through composing or interpreting a Bach partita and the state of the performer's mind ordinarily involved in commercial nude dancing are of one and the same kind, and that they also do not differ even in degree in a way sufficient to ground a constitutional distinction, we are forced to the second, or "So what?" form of response to Judge Posner's concerns. The argument would then simply be that declining to extend free speech protection to either the Bach partita or to commercial nude dancing would not in that respect be particularly calamitous.

Now, we should be prepared to stipulate to the cultural value of the Bach partitas and similar non-programmatic, nonthematic, nonverbal art. But it should be noticed that on Judge Posner's own assumptions, the cultural contribution of the Bach partitas is not to the world of ideas.[66] Presumably, no regime intent on suppressing the Bach partitas and similar works could therefore coherently do so because of its dislike of the (nonexistent) ideas conveyed by such works. As well, we must rule out of consideration any suppression of any art where the governmental restriction could

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64 R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 332 (1988). *See also* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Posner, *Rebuttal to Malloy*, 24 VAL. U.L. REV. 183 (1990).

65 For some relevant considerations, see Wright, *Legal Relativism and the Rehnquist Court*, 22 U. TOL. L. REV. 73 (1991); Note, *Relativistic Jurisprudence: Skepticism Founded On Confusion*, 61 S. CAL. L. REV. 1417 (1986). For a brief exposition of the distinction between self-realization in the sense utilized by writers such as Plato, Aristotle, Hegel, and John Stuart Mill on the one hand, and self-realization as simply doing whatever one cares to do on the other, see R.G. WRIGHT, *supra* note 14, at 1-31.

66 Thus, it is counterintuitive that the Bach partitas may deserve less free speech protection, or may deserve free speech protection less clearly, than a musically uninspired patriotic tune, only if we assume that musical value must dominate any other source of value for free speech purposes.

be said to violate any constitutional provision other than the free speech clause. One might, for example, challenge government censorship of art on independent grounds, such as the takings or equal protection clause. Our argument at this point is certainly not that artists have no constitutional rights at all.

Judge Posner is apparently prepared to make certain concessions in the face of the "So what?" form of response. Specifically, Posner recognizes that suppression of barroom commercial nude dancing would not, in and of itself, amount to a devastating blow to the practice of free speech.[67] But Posner is concerned not so much with the consequences of suppressing nude dancing in isolation, but with the possibility of such suppression amounting to a first step in a series of cumulatively more injurious acts of suppression. Posner wishes to avoid a possible "first step on the road back to the institutionalized puritanism of Cromwell's reign—during which all theatrical performances, including performances of Shakespeare's plays, were prohibited . . . ."[68] Posner has recently written elsewhere that "[c]omstockery could break out anew at any time, for, historically, censorship of the obscene has come in cycles (early Christianity, Puritan, Victorian)."[69]

This is an intriguing argument. One's immediate reaction is to doubt that the suppression of Bach or Shakespeare by government edict is particularly likely for the foreseeable future, regardless of how we decide cases like *Miller*. As Judge Posner himself writes, "[i]n the America of 1990 the project of stamping out nude striptease dancing is quixotic."[70] But it would perhaps be a mistake to survey the contemporary popular cultural scene and simply conclude that broad-based governmental suppression of nonthematic, nonideational, nonpolitical, nonverbal art is unlikely, however far removed the actual contemporary censorship cases may seem from Shakespeare. The more interesting and less dismissive response to Posner's concern over future government censorship of such nonthematic art would question whether Posner's inclination to protect barroom nude danc-

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67 *See Miller*, 904 F.2d at 1098 (Posner, J., concurring).

68 *Id.*

69 R. POSNER, *supra* note 64, at 329-30.

70 *Miller*, 904 F.2d at 1104 (Posner, J., concurring).

ing as speech is actually the approach best calculated to avoid or discourage any eventual broad artistic censorship.

It seems to be widely agreed that over the past half century or so, the line demarcating the obscene, the shocking, and the immodest has generally drifted steadily toward greater extremity, at least in the subject matter areas of most direct concern in *Miller*.[71] The logic of continually pressing the frontier of what counts as protected speech, or of what counts as speech in the first place, seems to borrow from the military strategy of ensuring that one's battles are fought over turf far removed from one's most valuable territory. The basic assumption seems to be that as long as the debate remains focused on tangential concerns, such as the status of commercial nude dancing, areas of more substantial and central concern remain safe from attack.

It is of course impossible to convincingly demonstrate in advance that this strategy for avoiding either a cataclysmic lurch or a gradual progression toward a highly restrictive free speech jurisprudence is unsound. We should at least recognize the possibility of its backfiring, however. By way of loose historical analogy, there may be no sufficient motive for a Thermidorian reaction in the absence of the excesses of the Terror.[72] This is not to suggest that there is some sort of inexorable Newtonian mechanism at work under which perpetual expansion of the scope and protection of the free speech clause eventually provokes a movement to an equal and opposite jurisprudential extreme. But it is plausible to argue that the cumulative result in cases such as *Miller* tends, in the minds of many ordinary citizens, ultimately to desanctify, if not to trivialize, the free speech clause. There are many persons who would be prepared to sacrifice mightily for the sake of a universal right to proclaim a distasteful ideology. Few of us, however, would be inclined to make a similar sacrifice for the sake of the full range of the speech potentialities of ordinary barroom nude dancing, regardless of our differences as to the moral value

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[71] *See id.* at 1091 (Posner, J., concurring)("Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more."). *Cf. id.* at 1124 (Easterbrook, J., dissenting)(observing how the arguments *reductio ad absurdum* propounded by Justices Douglas and Black in 1957 on public nudity and the scope of the free speech clause are now viewed as leading not to absurd, but to perfectly sound, conclusions).

[72] *See* C. BRINTON, ANATOMY OF REVOLUTION (rev. ed. 1965).

and the consequences of such activity.[73] If the scope of the free speech clause is extended beyond a certain point, the main effect of further extension is not to lead us to revere the newly protected activity through its association with uncontroversially protection-worthy activities, but to tend to bring the free speech clause into disrepute, at least beyond certain minimal bounds, as just a jurisprudential vehicle for constitutionally enshrining a sort of generalized libertarianism. If, in our society, *King Lear* is ever to be suppressed—as opposed to dying from public neglect—one suspects that such suppression will stem not from drawing distinctions between barroom nude dancing and *King Lear*, but from judicially classifying them together.

Now, it is easy to argue that the probability is low that the next jurisprudential embrace of nude dancing, or nude sunbathing, or geranium repotting, as a form of speech, however neutrally regulable, will eventually prompt a collapse in the free speech market. But it is just as easy to argue that the court's deciding against the plaintiffs in *Miller* would not have led inexorably to a regime of artistic thought control. Few better statements of this point exist than Posner's own scholarly analysis, published in 1986, of several of the Supreme Court's recent free speech cases. At that time, Posner argued that

> It is hard to believe that if any or all of these cases had been decided the other way, the marketplace of ideas would have been noticeably impaired, or that judicial opinions could not have been written distinguishing these cases from those where suppression would impair that marketplace. The only justification for these decisions is a fear . . . that if the Supreme Court opened the door only a crack, the door would quickly be blasted off its hinges. Yet a glance around the world will show that most countries whose political and social institutions are comparable to ours have a thriving marketplace of ideas, . . . even though they do not have judicially enforceable constitutional guarantees of freedom of speech and press.[74]

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[73] *Cf.* Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976)(making a similar point with respect to the cinematic medium).

[74] Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 46 (1986). Posner had previously observed that "when the domain of what is prohibited is narrowly limited — to hard core pornography, or to live public displays of nudity as in topless dancing — close substitutes for the prohibited matter remain, so that the net diminution in private (and social) benefits is small." *Id.* at 44-45.

It is irrelevant to this point that Judge Posner may now care more than he did in 1986 about the marketplace of emotions or feelings, as distinct from the marketplace of ideas. A point comparable to that made by Posner regarding the marketplace of ideas could just as easily be made about emotions or feelings as well. Even if one insists that it is precisely, and exclusively, "emotions" or "feelings" that are conveyed from the mind of the nonthematic artist to the mind of the audience, no horrifying long-term consequences would have been reasonably anticipable had *Miller* been decided the other way.

There is, on the other hand, some reason to fear that continuous expansion of the scope of the free speech clause may result eventually in a reduction in the average level or degree of constitutional protection accorded to that which is classified as speech. There would be a certain pragmatic logic to such a jurisprudential development, however unanticipated. It would of course be going too far to suggest that when the free speech clause becomes a mile wide in scope, it will become an inch deep in protection. But there is some logic to the view that something roughly akin to this attenuation process has already begun in the area of the free exercise of religion. The recent, apparently dramatic curtailment of free exercise rights under *Employment Division v. Smith*[75] may have been largely unexpected, but, after the fact, some such curtailment seems perfectly understandable in light of the frequent judicial unwillingness or inability to impose limits on what counts for legal purposes as a sincerely held religious belief or practice.[76] The more that counts as sincere religious belief, the less special such a general category inevitably becomes, and the greater the relative weight we begin to ascribe to competing values and competing considerations; hence, the less protection such belief or practice in general comes to receive.

Obviously, this partial explanation of *Smith* is speculative at best. But it is plausible enough to suggest, by analogy, that the judicial project, endorsed by Judge Posner in *Miller*,

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[75] 110 S. Ct. 1595 (1990).

[76] *Cf.* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988)(reversing the trial court's finding of religious insincerity based on the often difficult distinction between insincerity and repeated instances of "backsliding" or weakness of will). *See also* Frazee v. Illinois Dep't of Employment Sec., 409 U.S. 829, 833 (1989)(free exercise of religion claims need not be based on the mandates of an organized religious group).

of continually expanding the scope of the free speech clause may involve important risks and costs in terms of the values underlying the free speech clause itself. This would not be a progressive, genuinely liberating development. It may be that necessity will dictate certain modifications of our free speech jurisprudence in order to accommodate increasingly prominent relativist, subjectivist, and post-literate, if not post-verbal elements within our culture. The free speech jurisprudence of Judge Posner's opinion in *Miller* may tend to jeopardize, over the long term, important values that are still widely shared.